

FEB - 9 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Sections 11
and 13 of the Cable Television
Consumer Protection and Competition
Act of 1992

Horizontal and Vertical Ownership
Limits, Cross-Ownership Limitations
and Anti-trafficking Provisions

MM Docket No. 92-264

COMMENTS OF THE NATIONAL PRIVATE CABLE
ASSOCIATION, MAXTEL ASSOCIATES LIMITED PARTNERSHIP,
MSE CABLE SYSTEMS AND PACIFIC CABLEVISION

Introduction And Summary

These comments are submitted by the National Private Cable Association, MaxTel Associates Limited Partnership, MSE Cable Systems and Pacific Cablevision in response to the Notice of Proposed Rulemaking ("Notice") issued by the Commission pursuant to the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Act").

The National Private Cable Association ("NPCA") is the principal trade association for the private cable, or satellite master antenna television ("SMATV"), industry whose members provide multichannel video programming services via wired or wireless technology to residents of apartment complexes, condominiums, cooperatives, manufactured home parks, educational institutions, and other wholly private property communities. The private cable industry serves approximately three million subscribers nationwide and typically represents the only multichannel video services

No. of Copies rec'd
List A B C D E

0410

competition to traditional franchised cable operators in their area.

MaxTel Associates Limited Partnership is the largest private cable operator in the nation, with approximately 40,000 subscribers. Pacific Cablevision and MSE Cable Systems operate private cable systems serving approximately 15,000 and 10,000 subscribers, respectively.^{1/}

In the Notice, the Commission has invited commenters to address, inter alia, the prohibition imposed by Congress against common ownership of a cable system and either a multichannel multipoint distribution ("MMDS") system or a SMATV system in the franchise area. Notice, para. 24. Subject to two exceptions, Section 11 of the 1992 Act makes it unlawful for a cable operator

to hold a license for [MMDS] service, or to offer [SMATV] service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system.

1992 Act, § 11(a)(2), to be codified at 47 U.S.C. § 533(a)(2).

The first exception to the cross-ownership ban is a grandfather provision that waives the rule for the benefit of all MMDS and SMATV services owned by a cable operator as of the date of the enactment of the 1992 Act. Id. The second exception gives the Commission authority to waive the cross-ownership ban "to the extent the Commission determines is necessary to ensure that all

^{1/} NPCA and the other commenters will be referred to collectively as "NPCA".

significant portions of a franchised area are able to obtain video programming." Id.

In its Notice, the Commission tentatively concludes that existing rules "are consistent with and effectively implement the cross-ownership prohibition of the 1992 Cable Act as regards the MMDS service." Notice, para. 26, referring to 47 C.F.R. 21.912 (cable system/MMDS cross-ownership restriction). The Notice then suggests that the same rules should be applied in the SMATV context. In fact, there are several inconsistencies between the Commission's current MMDS rules and the cross-ownership ban codified by Congress. Moreover, to the extent they do reflect Congressional intent, the current MMDS cross-ownership rules are drafted in a technology-specific context that make it literally impossible to apply them to SMATV.

NPCA recommends that the Commission eliminate the existing MMDS rules and implement a single set of new rules that will prohibit a cable system from owning an MMDS or SMATV system whose protected or actual service area overlaps with the actual service area of the cable system. Thus, a cable operator will be permitted to acquire and operate a stand alone SMATV system within its franchise area, as long as the property served by such SMATV system is not one which is already passed by the cable system and which thus could be interconnected simply upon the payment of a standard interconnection fee.

To the extent a SMATV system is within the actual area served by the cable operator and thus subject to the cross-

ownership restriction, the cable operator still should be permitted to acquire the system and then be given a grace period in which to incorporate the SMATV service into the community-wide franchised service. Moreover, as long as all franchise requirements are observed, the cross-ownership restriction should not affect a cable operator's ability to provide service to a particular property via a separate satellite dish and headend dedicated to that property, even though such an arrangement might otherwise be viewed as a SMATV system. As explained more fully below, the rules proposed by NPCA are in accordance with Section 11 of the 1992 Act and resolve the inconsistencies between Section 11 and the current MMDS rules.

Finally, NPCA urges the Commission to adopt restrictions on the right of cable operators to engage in the creation and production of programming, to the extent other rules are insufficient to discourage significantly the anticompetitive practices which motivated Congress to pass the 1992 Act.

I. THE COMMISSION'S MMDS CROSS-OWNERSHIP RULES
AREN CONSISTENT WITH SEC. 11 OF THE 1992 ACT.

A. The Current MMDS Rules Are Both Underinclusive
And Overinclusive In Comparison With The
Cross-Ownership Ban Required By Sec. 11.

Under the current rules, a cable operator may not hold a license to operate an MMDS facility if the

protected service area [of that facility] is within the cable television company's franchise area, unless that cable television company is not the sole provider of cable television service in the franchise area.

47 C.F.R. § 21.912(a). By contrast, Congress has prohibited the Commission from granting an MMDS license to a cable operator only if MMDS service is to be provided "in any portion of the franchise area served by that cable operator's system." 1992 Act, § 11(a)(2). Thus, whereas the Commission rule generally prohibits a franchised cable operator from holding an MMDS license authorizing protected service anywhere in its franchise area, the 1992 Act permits the grant of a license to a cable operator in its franchise area, as long as the MMDS service area does not overlap the area "served" by the cable system. Had Congress intended to adopt the Commission's rules, it would have simply prohibited the use of MMDS frequencies by a cable operator "in any part of the franchise area," instead of "in any part of the franchise area served by the cable franchisee." In this regard, Congress intended a narrower cross-ownership restriction than exists under the Commission's rules.^{2/}

A second inconsistency between the MMDS rules and the 1992 Act arises from the current exemption applicable in franchise areas served by two or more cable operators. 47 C.F.R. § 21.912(a). The Commission's cable/MMDS cross-ownership ban does not apply in such areas. The statute contains no such exemption. Nor does the "overbuild exemption" contained in the current rules fall within the two exceptions provided in the statute, i.e., the mandatory waiver provision grandfathering existing cross-ownership

^{2/} The precise scope of the restriction intended by Congress is discussed in Section II, A, below.

situations, and the permissive waiver provision that the Commission has the discretion to invoke to ensure that video programming is provided to all significant portions of the franchise area.

Similarly, the rules contain a rural exemption, 47 C.F.R. § 21.912(d), that Congress did not codify. Nor did Congress adopt the Commission's exemption for the use of MMDS frequencies by cable operators for the transmission of locally-produced programming to cable headends. 47 C.F.R. § 21.912(e). Whatever the wisdom of these exemptions to the Commission's cross-ownership ban, Congress chose to omit them from the list of exemptions it created when enacting the statutory ban on cross-ownership. Congress' inclusion of two express exceptions to the cross-ownership ban signifies its rejection of any other exceptions, including those previously adopted by the Commission.

**B. The Current Restrictions On Cable/MMDS
Cross-Ownership Are Technology-Specific
And Are Incapable Of Application In
The SMATV Context.**

In its rush to resolve the cross-ownership issue, the Commission recommended the blanket adoption of the current rules regarding cable ownership of MMDS facilities in the SMATV context as well. Putting aside the inconsistencies between the current MMDS rules and the 1992 Act, it is literally impossible to apply the MMDS rules to SMATV.

This impossibility stems from the fact that the current MMDS cross-ownership restriction is based upon the "protected area" enjoyed by every MMDS licensee, i.e., the area in which the

licensee is "protected from harmful electrical interference"
." 47 C.F.R. § 21.912(d). Specifically, the Commission's rules prohibit the grant of an MMDS license to a cable operator if the MMDS "station's protected area is within the cable television company's franchise area" 47 C.F.R. § 21.912(a). Thus, the essential starting point in ascertaining whether the Commission's cross-ownership ban applies in a given situation is to determine the scope of the MMDS station's protected service area.

One cannot even begin to apply this rule in the SMATV context because SMATV systems do not have a protected area. Unlike its MMDS counterparts, a SMATV facility is not licensed to serve a particular area and is not given a protected area in which to operate. Rather, the scope of the service area is dependent upon the SMATV operator's success in negotiating and maintaining contractual relations with the owners of the properties which the operator serves or seeks to serve. The literal inapplicability of the current MMDS rules to SMATV demonstrate the need for new rules which implement the SMATV ownership restriction Congress intended to place on cable operators. The proper scope of those new rules is discussed below.^{3/}

^{3/} The one portion of the current rules which furthers Congressional intent is the section on ownership attribution. 47 C.F.R. § 21.912, Note 1. Since the cross-ownership ban contained in Section 11 of the 1992 Act is subject only to the two express exceptions discussed above, Congress clearly meant the ban, when applicable, to be interpreted broadly, thus supporting retention of the strict ownership attribution provisions contained in the current Rules.

II. NPCA'S PROPOSAL.

A. The Cross-Ownership Restriction Applies Only Within The Area Actually Served By The Cable Operator.

The 1992 Act prohibits a cable operator from "offer[ing] [SMATV] service, separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system." 1992 Act, § 11(a)(2) (emphasis added). In another context, the Commission has noted that the Senate and House conferees intended that "area served" be defined as "'an area actually passed by a cable system and which can be connected for a standard connection fee.'" Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Notice, MM Docket No. 92-265, FCC 92-543, para. 29 (rel. Dec. 24, 1992), quoting Conf. Rep. at 93.^{4/} Since there is no reason to believe that "area served" had different meanings in these two contexts, NPCA suggests that the Commission follow the construction of that phrase offered by the Conference Committee. The cross-ownership ban should prohibit a cable operator from providing separate SMATV service to any property actually passed by its cable system and which can be connected for a standard connection fee.

This interpretation of the statutory language comports with congressional intent and is eminently sensible to insure consumers have multichannel video programming services available. For example, a cable operator may be franchised to serve an entire large county, but in fact actually serves only a portion of that

^{4/} H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. (1992).

county, due to some extenuating circumstance such as a low population density in the other portions of the county.^{5/} In the midst of the low density area, however, there may be a particular private property community or apartment complex, such as a resort, large enough to justify the installation of a SMATV system, but too distant to permit interconnection with the cable system operating in the more densely populated portion of the franchise area. There is no reason to prohibit the franchised operator from competing for the right to provide SMATV service to the resort. Such a result merely lessens competition, in contravention of Congress' stated goal in enacting the restriction. Sen. Report at 46.^{6/}

Thus, the SMATV cross-ownership ban applies only within the cable operator's actual service area, not its authorized service area. Had Congress meant to impose the ban wherever the cable operator is authorized to provide service, it would have prohibited the use of SMATV facilities or MMDS frequencies "in any part of the franchise area," rather than "in any part of the franchise area served by the franchisee." The underlined language is rendered superfluous if the scope of the cross-ownership restriction is any greater than the actual service area of the cable operator.

^{5/} Franchising authorities often permit cable operators to limit the scope of their service for such reasons, since it can be cost prohibitive to offer service to every resident of a franchise area with a low population density.

^{6/}S. Rep. No. 92, 102d Cong., 1st Sess. (1991).

C. The Commission Should Adopt A Grace
Period Permitting A Cable Operator
To Offer SMATV Service "Separate And
Apart" From Its Cable Service For A
Limited Period Of Time.

In adopting cross-ownership rules, the Commission should be mindful of the fact that it is routine for a cable operator to acquire from a private cable operator an existing SMATV system within the area served by the franchised cable operator. Under Section 11, the cable operator may not operate that SMATV system "separate and apart" from the franchised system. Although the exact meaning of "separate and apart" will be discussed more fully below, it is crucial for the Commission to create a grace period during which the cable operator may incorporate the SMATV service into its franchised service.

For example, there may be some technological incompatibility that prohibits the cable operator from immediately being able to operate the SMATV system as a part of its franchised service. Similarly, in acquiring the SMATV system, the cable operator might become subject to a contract, originally negotiated by the predecessor private cable operator and the private property owner, which imposes obligations that are inconsistent with or different than the operation of the franchised service. Whenever a cable operator acquires a SMATV system, the cable operator should be given a grace period of at least 90 days to incorporate the SMATV service into its franchised service. The 90-day period could be increased in accordance with the normal waiver procedure, in proper circumstances.

This grace period will encourage entry into the SMATV market by private cable operators who do not wish to compete for franchises but who, in fact, wish to compete with the traditional franchised industry, in furtherance of congressional intent. It is fundamental that before making such a competitive entry, a rational investor will take into account potential exit strategies, should that need occur.^{7/} Since the primary exit strategy may very well be a sale to the local franchised operator, a grace period should be established. Absent a grace period, the consummation of the sale of a SMATV system from a private cable operator to the franchised cable operator would likely put the buyer in an immediate violation of the cross-ownership restriction. In essence, the main exit strategy would be eliminated, thus discouraging private investors from acquiring private SMATV systems in the first instance. The grace period is necessary to further Congress' intent that the cross-ownership restrictions further, not hinder, competition in the multichannel video services marketplace.

At first blush, it may seem that the rationale for the grace period undercuts the competitive goals of Congress, since the grace period will be employed only when one competitor is leaving the marketplace by selling out to another, thus lessening competition. However, the private cable operator's departure in these circumstances is inevitable. It is caused not by the grace

^{7/} For example, investment in the stock market would virtually disappear if stockholders could not easily sell their shares, and were instead required to be content with whatever dividends the stock might generate.

period which should be built into the cross-ownership restrictions, but rather by economic considerations which will exist without regard to the cross-ownership restriction. The pro-competitive policies of Congress are best served, then, by leaving reasonable exit strategies available to would-be SMATV investors.

Indeed, the cross-ownership restriction enacted by Congress already has threatened to produce anticompetitive effects due to the absence of an express grace period. Specifically, some cable operators have warned owners of multiple unit dwellings not to enter into SMATV contracts with private cable operators, on the grounds that the franchised operator will be prohibited from taking over the SMATV system, should that become necessary or desirable at some point, due to the cross-ownership restriction. The inclusion of a grace period will resolve this problem and remove yet another obstacle to the continuing development of competition to the franchised industry.

D. The Restriction Applies Only To The
Extent The SMATV Service Fails To
Satisfy The Franchise Obligations Of
The Cable Operator.

When applicable, the cross-ownership restriction prohibits a cable operator from offering SMATV service which is "separate and apart from [the] franchised cable service" 1992 Act, § 11(a)(2). The "separate and apart" language should be construed to permit a cable operator to conduct what would appear to be a physically separate SMATV system, even within its "franchise area served," as long as the SMATV system is operated in

accordance with the cable operator's franchise requirements. Thus, the cross-ownership restriction should not prohibit a cable operator from using a separate satellite dish and headend to serve a particular apartment complex, even though that configuration might be deemed a SMATV system when viewed in a vacuum. This clarification is required for the same reason that a grace period is necessary. The Commission will encourage investment in the SMATV industry by, among other things, making sure exit strategies may be pursued without undue hardship. This goal will be frustrated if a cable operator is prohibited from acquiring and operating a stand-alone SMATV system, simply because that system has its own dish, even though the service being provided to subscribers is fully integrated with the cable operator's overall service in the franchise area.

Even putting aside the interests of SMATV providers, there is no reason to believe that Congress was concerned with whether the cable operator provides service to the entire community via a single cluster of commonly-located dishes, or via numerous dish clusters scattered throughout the community. No purpose is served by prohibiting the cable operator from deciding how its cable system should be configured. The cable operator simply should be required to abide by its franchise obligations. If the franchise requires uniform programming, service, and rates, the cable operator will be required to observe those requirements within the "franchise area served," regardless of whether that area

includes what might otherwise appear to be a SMATV system, e.g., a stand-alone system serving only a particular apartment complex.

This clarification will permit cable operators to acquire and operate existing stand-alone SMATV systems without fear of violating the cross-ownership restrictions, integrated operations and that the actual service complies with the franchise requirements or is brought into compliance within a reasonable period. See Section C above. Allowing for this transfer of SMATV systems will encourage entry into the SMATV market by competitors to the franchised industry, thus stimulating competition, and will help eliminate disruption to SMATV customers in those instances when a private SMATV operator decides to sell its system to the franchised operator.

E. The MMDS Rules Should Mirror The
 SMATV Rules Described Above.

The cable cross-ownership rules with respect to MMDS should mirror, to the extent possible, those applicable to SMATV. The obvious difference, as noted above, is that the restriction applies in the MMDS context only to the extent there is an overlap between the protected service area of the MMDS station and the portions of the franchise area actually served by the cable system.

III. THE COMMISSION SHOULD NOT HESITATE TO IMPOSE
 LIMITS ON THE ABILITY OF CABLE OPERATORS TO
 ENGAGE IN THE CREATION OR PRODUCTION OF PROGRAMMING.

In Section VII of the Notice, the Commission discusses its statutory duty "to consider the necessity and appropriateness of imposing limitations on the degree to which multichannel video

programming distributors may engage in the creation or production of video programming." 1992 Act, § 11(c), to be codified at 47 U.S.C. § 533(f)(1)(C). See Notice, para. 56 et seq. The need for such limitations springs from the anticompetitive effect of the vertical integration between cable operators and programmers. 1992 Act, § 2(a)(4),(5). Thus, although the statute directs the Commission to consider imposing limits on all multichannel video program distributors, Congress specifically found that the vertical integration which threatens competition involved cable operators, i.e., franchised video providers: "The cable industry has become vertically integrated; cable operators and cable programmers often have common ownership." 1992 Act, §2(a)(5) (emphasis added).

On the other hand, private and wireless multichannel video program distributors are among the intended beneficiaries of the restrictions discussed in Section VII of the Notice: "Vertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies." Id. (emphasis added). In the program distribution rulemaking commenced pursuant to Sections 12 and 19 of the 1992 Act, NPCA has documented instances of affiliated programmers refusing to sell their product to private multichannel program distributors, or agreeing to sell only on discriminatory and unreasonable terms. See Comments of NPCA, et al., Implementation of Section 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-

265, FCC 92-543 (filed January 25, 1993). Vertical integration between cable operators and programmers also threatens independent programmers seeking carriage of their programming since, as Congress noted, cable operators have the "incentive and ability to favor their affiliated programmers" with respect to the terms and conditions of carriage. 1992 Act, § 2(a)(5).

In the Notice, the Commission suggests that its proposals in this proceeding and those set forth in the program distribution docket fully respond to the concerns of Congress, thus obviating the need for restricting the ability of cable operators to participate in the production and creation of programming. Notice, para. 60. Although Congress did give the Commission discretion in this regard, 1992 Act, § 11(c), clearly Congress did not feel that any such restrictions necessarily would be cumulative or redundant, or else it would not have directed the Commission to consider the need for them in addition to the other rules which the Commission is required to adopt under the 1992 Act.

Unfortunately, the Notice indicates that the Commission has given rather scant consideration to the need for these restrictions. For example, the Notice emphasizes that the proposed channel occupancy rules will alleviate much of the harm that flows from vertical integration. But channel occupancy limits help only the independent programmers by limiting the number of affiliated programmers to whom the cable operator can give special treatment. Channel occupancy limits fail to address the problem which non-

affiliated private and wireless operators have in obtaining non-discriminatory service from affiliated programmers.

Similarly, the Commission suggests that Section 12 of the Act remedies the problems which Congress was addressing when it suggested limits on the involvement of cable operators in program creation and production. Notice, para. 58. Yet prohibiting cable operators from requiring a financial interest in a programming service as a condition of carriage -- a prohibition mandated by Section 12 -- does not prevent cable operators from obtaining such an interest and, again, does not preclude or even address discriminatory treatment of unaffiliated multichannel providers by affiliated programmers. The other Section 12 restriction identified by the Commission also is directed toward unaffiliated programmers, as opposed to unaffiliated video distributors.

The Commission correctly notes that Section 19 of the Act at least addresses the anticompetitive efforts of the franchised industry vis-a-vis their private counterparts. Notice, para. 59. However, the conditional language of Section 19 suggests that the restrictions to be issued thereunder will lead primarily to disputes as to what is an "unfair" or "deceptive" practice, and when has a cable operator "unduly" or "improperly" influenced a programmer. In the corresponding Notice, the Commission professed some uncertainty as to how such terms might be enforced. NPCA fears that effective relief will be available under Section 19, if at all, only to those private video distributors who are able, and who find it worthwhile, to risk funding adjudicatory proceedings


against the franchised industry on a case-by-case basis to debate the meaning of words such as those quoted above. A precise limitation on the degree to which cable operators may participate in programming will compensate for any literal and practical ambiguities in the other provisions of the 1992 Cable Act, and the rules promulgated thereunder, aimed at addressing the problems stemming from vertical integration.

Regardless of how precise the Commission drafts its rules pursuant to Sections 11, 12, and 19 of the 1992 Cable Act, those rules have not yet been adopted. Accordingly, it is difficult to respond to the Commission's invitation to explain the proper extent of "further restrictions" limiting cable operators' participation in programming. Notice, para. 60. A proper response depends upon the scope of the other restrictions to be adopted by the Commission under this rulemaking and the contemporaneous program distribution proceeding. To the extent the rules adopted under other provisions of the 1992 Cable Act provide private cable operators only limited and contingent relief from the problems of vertical integration, the Commission should not hesitate to place definite limits on the extent to which a cable operator may engage in the creation or production of video programming, in accordance with Section 11.

CONCLUSION

NPCA respectfully requests that the Commission adopt cross-ownership rules and program production rules in accordance with the foregoing comments.

Respectfully submitted,


Deborah C. Costlow
Thomas C. Power

WINSTON & STRAWN
1400 L Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 371-5700

Counsel for National Private Cable
Association, MaxTel Associates
Limited Partnership, MSE Cable
Systems and Pacific Cablevision

Dated: February 9, 1993